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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DONNA HEILWEIL,

Petitioner,

v.

MOUNT SINAI HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Donna Heilweil, *Pro Se*
306 E. State Street #230
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November 14, 1994

41 pp

QUESTIONS PRESENTED

Whether a plaintiff who presents uncontested medical diagnoses of respiratory diseases including asthma, bronchiectasis, recurrent pneumonias, and chronic pansinusitis is an "individual with handicaps" as defined in the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The court below ruled in the negative as a matter of law.

Whether an employer may lawfully terminate a disabled employee expressly and solely because of that employee's disability, so long as the symptoms of the disability have abated temporarily during a period of accommodation of the disability and the termination is made while the symptoms are temporarily abated. The court below ruled in the affirmative as a matter of law.

Whether the District Court in a case alleging wrongful termination because of physical disability may resolve contested material issues of fact and draw inferences from those facts, including an inference of non-discriminatory intent, against the party opposing a motion for summary judgment. The court below affirmed such actions by the District Court, and supplemented the same with additional factual findings that were essential to its own decision.

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MOUNT SINAI HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment which affirmed a grant of summary judgment dismissing petitioner's claims under the Rehabilitation Act of 1973 and all pendent state claims. Heilweil v. Mount Sinai Hospital, 32 F.3d 718 (2nd Cir. 1994).

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit was reported at 32 F.2d 718 (2d Cir. 1994), and is included in the Appendix at 2a.

The Memorandum and Order of the United States District Court for the Southern District of New York was reported at 1993 U.S.Dist. LEXIS 10601, 2 A.D.D. 729 (S.D.N.Y. 1993), and is included in the Appendix at 17a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 17, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The texts of 29 U.S.C. §§ 794(a) and 706(8)(b) are reproduced in the Appendix at 22a. The text of 28 C.F.R. § 41.31 is reproduced in the Appendix at 23a.

STATEMENT OF THE CASE

A. Preliminary Statement

The Rehabilitation Act of 1973 protects handicapped individuals from discrimination in employment due to physical disability. Breathing impairment is expressly included in the Act's statutory and regulatory definitions of handicap. This Court and Circuit Courts of Appeals have held that the Act's definition of "handicap" must be construed broadly to achieve the remedial purposes of the Act. The uncontested evidence below shows that petitioner is a person with respiratory disabilities including asthma, bronchiectasis, pneumonias, and sinusitis. Petitioner's employer accommodated her disability temporarily, and to positive effect on petitioner's health, but refused to accommodate the disability on a long-term basis. Indeed, the employer admitted that it dismissed petitioner solely because of the restrictions on her activities that were imposed by her disability. It seems a simple matter to conclude that this case at very least should progress to trial.

On this record, however, the United States Court of Appeals for the Second Circuit found as a matter of law that plaintiff was not an "individual with handicaps" as defined in the Act. They reached this conclusion by finding that petitioner's symptoms improved significantly while her disability was accommodated by her employer, that the decision to dismiss petitioner was made during this temporary accommodation, and accordingly, that the termination was not due to disability.

The decision below conflicts with the law of the United States Courts of Appeals for the Seventh and Ninth Circuits, where respiratory sensitivity and disease are afforded much greater protection against discrimination as a matter of law. See Byrne v. Bd. of Educ., School of West Allis-West Milwaukee, 979 F.2d 560, 562-66 (7th Cir. 1992) (extent of disability caused by sensitivity to airborne allergen states a jury question); Ackerman v. Western Electric, 643 F. Supp. 836 (N.D. Cal. 1986); affirmed, 860 F.2d 1514 (9th Cir. 1988) (summary judgment in favor of asthmatic plaintiff discharged due to restrictions imposed by her asthma).

The decision below also creates a new, broad and dangerous exception to the Act's prohibition of discrimination. The court below held as a matter of law that employers may dismiss disabled employees whose symptoms subside when removed from a workplace stimulus, expressly because of the limitations posed by their disabilities, so long as the employer first accommodates the disability and terminates after the symptoms have subsided. This exception promises to swallow the rule, and is applicable in all cases regarding employees who suffer permanent disabilities that are aggravated by workplace exposures. The reasonable accommodation requirement of the Act is intended to shield employees from discrimination. The standard articulated by the court below will allow employers to use that same requirement as a sword to justify termination of employees with such disabilities. The implications for future enforcement of the Act, and consequently, of the Americans with Disabilities Act, are troubling.

The Second Circuit reached these flawed conclusions based upon improperly-found facts which were contrary to plaintiff's evidence and reasonable inferences therefrom. The reasoning of the lower court's decision depends upon rejection of petitioner's evidence and inferences therefrom regarding the timing of the decision to terminate, the nature of petitioner's physical condition at various points in time, and other contested material points. The court below went so far as to make exculpatory findings regarding the state of mind of petitioner's employer, extraordinary given the procedural context of the matter.

The petitioner asks that this Court grant certiorari to avoid the creation of an enormous gap in the law which prohibits discrimination

on the basis of disability, to restore uniform inclusion of respiratory disease within the Act's protection among the Circuit Courts, and to provide petitioner an important day in court which was denied because of adverse fact-finding at the appellate level.

B. Factual Background

Petitioner Donna Heilweil ("Heilweil") was employed by Respondent Mount Sinai Hospital ("hospital") from 1987 through 1989. Heilweil received a B.A. and M.B.A. from Cornell University and had successful experience with other employers prior to her work at the hospital. There she received consistently favorable reviews and frequent salary raises. She was twice promoted during her relatively short tenure there, ultimately elevated to the position of Administrator of the Blood Bank, a division of the hospital with over 50 employees and an annual budget of over $12 million. Petitioner had financial and record-keeping responsibility for this entity; on-site operations were overseen by the Medical Director through several laboratory supervisors.

Heilweil was diagnosed as asthmatic prior to employment at the hospital. She controlled this disability by regular ingestion of medications and by avoidance of allergens and other air-borne irritants. Heilweil's respiratory symptoms worsened dramatically shortly after her relocation into the Blood Bank. She experienced wrenching coughing fits, wheezing and respiratory constriction, recurrent respiratory infections, and other respiratory ailments. Her breathing became impaired progressively to the point that she was unable to exercise, climb stairs or even laugh without triggering a coughing and wheezing fit. These symptoms appeared to abate when Heilweil absented herself from the Blood Bank for extended periods. That abatement, however, was deceptive and incomplete. In 1991 Heilweil was found to be suffering from chronic pansinusitis which had begun in or about the time she was employed in the Blood Bank. Over the years the disease had progressed to cause skull deformation and internal scarring which required corrective surgery for partial relief of symptoms. Heilweil also was diagnosed as having developed bronchiectasis, a chronic, irreversible, progressive and life-threatening disorder of the lining of the lungs which renders them susceptible to infection and which is believed to be the result of repetitive lung infections. Heilweil remains disabled

and requires regular medication and environmental conditioning to maintain adequate respiration and to control infection.

The Blood Bank was located in a windowless basement at the hospital and was thus totally dependent upon artificial ventilation. The hospital's records show that air in this space was contaminated by high levels of diesel exhaust, heating oil fumes, natural gas leaks, soiled linens, and other irritants, and that temperature in the space, which was located directly above the heating plant for the building, fluctuated wildly. Those records show further that the hospital was aware that ventilation of the Blood Bank was so poor that its conditions posed a hazard to the health of employees and patients during the time of Heilweil's employment. The hospital failed to take appropriate measures to correct the same despite its awareness of the risks and despite repeated complaints from Heilweil and many others about those conditions (the hospital did, however, spend over $300,000 to improve ventilation of the Blood Bank *after* Heilweil was terminated and her suit commenced).

In March of 1989 Heilweil's physician advised her that the Blood Bank was an "asthmatic's nightmare" due to its poor ventilation and temperature control, and that she should not enter that space. Heilweil promptly conveyed this information to her supervisor, Joel Seligman, an Associate Director of the hospital. She requested that her disability be accommodated by moving her office to a better-ventilated location near the Blood Bank. Seligman admitted that he had observed Heilweil in respiratory distress prior to this date, and that he believed that the Blood Bank's conditions might pose a health hazard to Heilweil. Seligman replied immediately, however, that this accommodation was not possible on a long-term basis, and that Heilweil would have to be replaced as Administrator of the Blood Bank because she was unable to enter its space.

Seligman directed that Heilweil continue in her role, however, until her replacement could be located and until after the transition to a new Medical Director for the Blood Bank had been accomplished in June 1989. Heilweil continued to perform all of her duties without entering the Blood Bank from March through July 1989. She did so despite adverse conditions -- during this period she was denied an office

and had to work from a table in the hospital library without clerical support and to use a house telephone in the library stacks. The hospital, however, had no complaints regarding her job performance during this time, proving that accommodation was possible and reasonable.

After notifying Heilweil that she was terminated from her position as Blood Bank administrator, Seligman said he would help Heilweil find another position either within or outside the hospital. Heilweil repeatedly asked Seligman to allow her to continue as Administrator of the Blood Bank, or to find her another position at the hospital. Seligman never offered any other position, even though other positions were available and filled during this time period, and even though Seligman had the power to offer those positions to Heilweil. Seligman later offered to act as a reference for Heilweil with other employers, but Heilweil declined the offer because by this time she had come not to trust Seligman.

About two months after notifying Heilweil that she was to be removed from her post, Seligman requested that Heilweil provide documentation of her medical condition. This request was made even though Seligman already had admitted to Heilweil his belief in her disability, and even though Heilweil had been a patient with regard to her disability at the hospital itself. Heilweil declined Seligman's request because she believed it was made solely to better the hospital's legal position regarding the termination, and would not convince the hospital to reverse its decision to terminate her.

On June 2, 1989 Heilweil advised Seligman that she had become pregnant and was due to deliver in December or January. Seligman responded during that same conversation that, as a result of that news, the search for Heilweil's replacement would be accelerated. Heilweil filed suit against the hospital later that month. She was demoted to the position of Assistant to her own replacement in less than a month.

On August 25, 1989, the hospital terminated Heilweil's employment. They disingenuously called this a "resignation" in Heilweil's personnel forms, causing a delay in her receipt of unemployment benefits, and recanted this characterization only after unemployment payments had been commenced despite the hospital's

misinformation. The hospital admits that the sole cause for Heilweil's termination was her refusal to enter the Blood Bank, despite their awareness that such entry would aggravate her respiratory disease, and despite the existence of reasonable accommodations for Heilweil's disability.

C. Procedural Background

Heilweil filed suit in the United States District Court for the Southern District of New York in June 1989 alleging, *inter alia*, violation of the Act. The hospital moved for summary judgment in November of 1992 on grounds including that Heilweil was not a person with handicaps as defined in the Act.

The District Court found that "ventilation in the blood bank was quite poor and this caused [Heilweil] various respiratory problems," that "plaintiff's respiratory condition was severely exacerbated by working in the blood bank," and that Heilweil was dismissed solely because she could not enter the Blood Bank. Nonetheless, the District Court held that Heilweil was not a person with handicaps as defined in the Act, and granted summary judgment. The District Court's analysis was based upon two essential findings of fact: (1) that the hospital decided to terminate Heilweil in June 1989, and (2) that Heilweil's disability had abated while the hospital was accommodating her disability, and before she was terminated. The District Court reasoned therefrom that the decision to terminate was not discriminatory because it was made at a time when Heilweil was not disabled.

The Court of Appeals for the Second Circuit affirmed. They, too, noted that the Blood Bank's "ventilation system made plaintiff's asthma much worse," that Heilweil currently has severe respiratory disease, that Heilweil's work was alleged to be outstanding, that "her discharge came after she informed her supervisor that her doctor told her she should no longer work [in the Blood Bank],"and that Heilweil's dismissal was not for any cause unrelated to her respiratory disease and its consequent limitations upon her activities. They found, however, that Heilweil was not an individual with handicaps, primarily for the same reasons articulated by the District Court, and based this ruling upon the same improper factual findings, among others, that were

wrongly employed by the District Court.

REASONS FOR GRANTING THE WRIT

At issue in this case is the consistent and effective application of all laws which prohibit discrimination in employment on the basis of disability. The narrow issue raised here is the Second Circuit's unjustified exclusion of an entire class of respiratory disease from clear and predictable protection under the law. The ruling below will block many meritorious claims, and is in conflict with the law of other Circuits and with this Court's own opinions regarding interpretation of the Act generally. The method by which this incorrect holding was reached has more broad and troubling implications. The Second Circuit has created a standard which allows employers to require that disabled employees submit to working conditions that are known to pose a health hazard to the employee as a condition of their continued employment. This standard is contrary to the letter and spirit of the Act, and undermines the enforceability of the Act and similar statutes as to all categories of disability which are capable of abatement during accommodation.

A. The Second Circuit Standard Creates an Exception Which Swallows the Rule Against Disability Discrimination

In order to be classified as handicapped, an individual must be: (1) inflicted with a physical or mental disorder or condition which substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) be regarded as having such an impairment. If such a handicap is shown, covered employers have a duty to reasonably accommodate the handicapped employee. 29 U.S.C. 706(8)(B) (1988), subsequently amended by Pub. L. No. 102-569, 102 (f)(2) (1992) and Pub L. No. 103-73, 103(2)(B) (1993).

The law clearly prohibits termination of a disabled employee if the disability can reasonably be accommodated. It is equally clear that an employer cannot accommodate only temporarily a permanent disability which has symptoms that do not abate (*e.g.*, paraplegia, blindness), say, for a few months, and then lawfully terminate the

employee because of the disability. Under such a rule, employers could simply employ a ritual period of temporary accommodation before inevitable termination, and thus eviscerate the statute.

It should follow that an employer cannot accommodate only temporarily a permanent disability which has symptoms that *do* abate temporarily, and then terminate the employee because of that same disability after the symptoms have abated. Such a rule would end any employer obligation to offer long-term reasonable accommodations to employees who suffer disabilities that are related to the work-place. The implications of such a rule are highly disturbing.

Consider that employers have been required to accommodate employees with repetitive motion disabilities such as carpal tunnel syndrome by providing rest breaks, job sharing, and other methods intended to reduce the symptoms of the disability. If accommodation is required only until symptoms subside, an employer of such a disabled employee could simply: (1) temporarily institute a job-sharing schedule; (2) wait a few weeks or so until the employees believe their symptoms have subsided; and then (3) discontinue the job sharing schedule, and discharge any employees who will not return to work according to the old schedule. Following this method, *the employer could knowingly and unnecessarily impose working conditions that are damaging to the health of disabled employees as a condition of their continued employment*. If this were the law, employers could lawfully terminate any employee who objected to such treatment *for the express and sole reason that the employee was unwilling to be exposed unnecessarily to conditions which are known by all to cause illness in the disabled employee*. Such a standard would encourage discrimination, indeed, would make a cruel joke of the protection intended by the Act.

This, however, is precisely the standard adopted by the Second Circuit in this case. They found that Heilweil has a permanent respiratory disability which was severely aggravated by exposure to the poor air in the Blood Bank, that her breathing was seriously impaired in March 1989, and that her symptoms abated during three months of accommodation afforded from March 1989 through June 1989. The hospital refused to continue this accommodation long term, although its reasonableness had been demonstrated in practice, and required that

Heilweil return to the Blood Bank as a condition of her continued employment. Heilweil declined because return to the Blood Bank would certainly compromise her health in a very serious respect. She was terminated solely and expressly because she would not return to work in that location, even though the hospital was aware of the health implications of their mandate.

The hospital's conduct is morally reprehensible. The ruling of the court below is even more disturbing in light of its procedural context -- they found that this set of facts does not constitute discrimination as a matter of law.

The Second Circuit's standard creates a tautology which prevents any protection for permanent disabilities which temporarily abate. If no reasonable accommodation can be found which is effective in abating symptoms, then there is no duty to accommodate. If such an accommodation can be found, then the problem of temporary accommodation is presented. Either way, employees who undeniably have significant disabilities go needlessly without protection. The standard should be rejected.

B. The Second Circuit's Denial of Adequate Protection for Respiratory Disease Conflicts With Rulings of the Seventh and Ninth Circuits

In addition to creating a facile method for intentional and overt discrimination without liability, the Second Circuit's holding conflicts with the law of the Seventh and Ninth Circuits. Those courts found that the Act's protections extend to asthmatics with far less disability than shown here by Heilweil. See Byrne v. Bd. of Educ., School of West Allis-West Milwaukee, 979 F.2d 560, 562-66 (7th Cir. 1992) (extent of disability caused by sensitivity to airborne allergen states a jury question); Ackerman v. Western Electric, 643 F. Supp. 836 (N.D. Cal. 1986); affirmed, 860 F.2d 1514 (9th Cir. 1988) (summary judgment *in favor of* asthmatic plaintiff discharged due to restrictions imposed by her asthma). See also Vickers v. Veterans Administration, 549 F. Supp. 85, 87 (W.D. Wa. 1982) (sensitivity to tobacco smoke limited major life activity, "the capacity to work in an environment

which is not completely smoke free").

The Second Circuit's restrictive reading of the Act is contrary to the statute's broad remedial purpose and this Court's pronouncements regarding the same. See School Board of Nassau County, Florida v. Arline, 480 U.S. 273, 279-80 (1987). See also Allen v. Heckler, 780 F.2d 64, 67 (D.C. Cir. 1985) (The Act was passed as a "sweeping, statutory attempt to combat all forms of discrimination against the handicapped"). Uniform and reasonable application of the law would send this case to trial for determination of the date of discharge, the extent of disability at all relevant times, the employer's awareness of the same, the reasonableness of various forms of accommodation available, and so forth. The law in other Circuits would not permit dismissal of this case as a matter of law.

C. The Courts Below Resolved Rather Than Identified Triable Issues of Fact

The injustice of the legal errors described above is magnified here because those conclusions are premised upon facts found improperly by the Court in favor of a party moving for summary judgment. In their opinions, the District Court and the Second Circuit both adopted the hospital's position on disputed issues of fact including, without limitation: (1) the date on which the hospital decided to discharge Heilweil, (2) Heilweil's medical condition at all relevant times, (3) the scope of Heilweil's employment duties (material to whether long-term accommodation by provision of an off-site office would be reasonable), and even (4) Seligman's credibility and non-discriminatory intent.

The Second Circuit at times appeared consciously unwilling to take the facts in the light most favorable to the party opposing the motion. Regarding the critical issue of the date that termination was decided, Heilweil testified as described above the decision was made and announced in March 1989. The hospital contends that this decision was not made until June 1989. Rather than adopt Heilweil's position on the issue, the Second Circuit instead notes that "Although the parties disagree as to precisely what was said [in March 1989], it is undisputed that because of her physical reaction to that facility's environment,

Heilweil was no longer expected to work there on a regular basis." The court below later drops all pretense and openly adopts the hospital's version of the facts, holding that the relevant time for considering the state of Heilweil's health was in June 1989 because that was the time that the decision to terminate was reached.

If the court below adopted instead Heilweil's position that termination was decided in March 1989, as it was compelled by controlling law to do, then the balance of the court's analysis regarding medical condition and employer good faith would have been irrelevant. It would follow that the decision to terminate already had been made, at a time of great respiratory disability, with the employer's admitted knowledge of the same, and with the employer's admission that the dismissal was due solely to the effects of the medical condition.

The court below also ignored uncontested evidence regarding Heilweil's medical condition at all relevant times, and the hospital's awareness of the same. Heilweil claimed that Seligman was aware of her medical condition no later than March 1989, and Seligman himself admitted the same at deposition and admitted his belief that she had respiratory problems. The Second Circuit, however, failed to mention these on-point admissions. Plaintiff also had been a patient in the hospital for treatment of her disease, and the hospital had notice and proof of her condition, but the court below again sided with the hospital to find that "the first medical documents [the hospital] received were physician's records attached to Heilweil's affidavit in opposition to Mount Sinai's motion for summary judgment." The court ignored plaintiff's uncontested medical affidavits. Heilweil's physician stated plainly that in 1991 it was *discovered* that Heilweil had been suffering from chronic respiratory illnesses which had *begun* several years prior. The court below, however, read that same affidavit to say that "The records indicate that *after* March 1991 Heilweil's medical condition deteriorated . . ." (emphasis added). The court below instead seized upon a deposition quote from Heilweil that she felt "fine" in June 1989 to provide a basis for finding as a matter of law that Heilweil was not significantly impaired during June 1989, even though that subject assessment with hindsight is known to be completely wrong.

The court below went so far as to infer non-discriminatory

intent by the defendant. Heilweil contends that the hospital could have continued the 1989 temporary accommodation indefinitely, and cited her satisfactory performance during that period as proof of the same. The hospital contended that this was not possible due to ill-defined inconveniences. On this disputed record the court below found that "It became apparent to Seligman that Heilweil could not serve in her administrator capacity and he would need to find a replacement." The court bolstered this conclusion by finding that Heilweil was responsible for day-to-day operation of the Blood Bank, a finding contradicted by Heilweil's testimony -- and her official job description published by the hospital. Suffice to say that this exculpatory mind reading and selective recall was not in favor of the party resisting the motion for summary judgment.

Space does not permit similar development or even exhaustive identification of all facts which were wrongly found against Heilweil. The examples above are illustrative of the kind, if not the extent, to which Heilweil was denied her right to trial by wrongful fact determination *de novo* at the appellate level. In combination, these findings were used to create wrongfully a factual basis for an ill-conceived legal standard. The result is unfairness to the petitioner and potential unfairness to many similarly-situated disabled employees.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE
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APPENDIX TO
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UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 1139 -- August Term 1993
(Argued March 31, 1994 Decided August 17, 1994)

Docket No. 93-7881

DONNA HEILWEIL

Plaintiff-Appellant,

v.

MOUNT SINAI HOSPITAL,

Defendant-Appellee.

Before:

TIMBERS, CARDAMONE, and WINTER
Circuit Judges

Plaintiff, Donna Heilweil, appeals from a judgment of the United States District Court for the Southern District of New York (Owen, J.) entered August 5, 1993, granting defendant Mount Sinal Hospital's motion for summary judgment and dismissing plaintiff's complaint that alleged she was demoted and discharged in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e to 20OOe-17, and common law claims alleging an unsafe work environment and breach of contract.

Affirmed.

DENNY CHIN, New York, New York (Anne L. Clark, Vladeck, Waldman, Elias & Engelhard, P.C., New York, New York, of

counsel), for Plaintiff-Appellant Donna Heilweil.

AARON J. SCHINDEL, New York, New York (Seth Michael Popper Proskauer Rose Goetz & Mendelsohn, New York, New York, of counsel), for Defendant-Appellee Mount Sinai Hospital.

CARDAMONE, Circuit Judge:

Plaintiff, Donna Heilweil, appeals from a judgment of the United States District Court for the Southern District of New York (Owen, J.) entered August 5, 1993, granting defendant Mount Sinai Hospital's motion for summary judgment and dismissing plaintiff's complaint that alleged she was demoted and discharged in violation of the Rehabilitation Act of 1973, as amended 29 U.S.C. §§ 701-796 (Act), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e to 2000e-17 (Title VII), and common law claims alleging an unsafe work environment and breach of contract.

The issue on this appeal is whether plaintiff, an asthmatic, is a handicapped person under the Rehabilitation Act so that her employer's decision to terminate her subjects it to liability for damages. Plaintiff held the position of administrator in the blood bank of the hospital where she worked. Located in the basement of one of the hospital's buildings, that facility's ventilating system made plaintiff's asthma much worse. Her discharge came after she informed her supervisor that her doctor told her she should no longer work there. But the inability to satisfy the requirements of a particular assignment does not mean that a person is regarded as handicapped. Such inability does not constitute the necessary substantial limitation of a "major life activity" required to meet the definition of a handicapped person under the Act. To meet that definition, the employee's impairment must limit her employment generally.

BACKGROUND

Plaintiff Donna Heilweil began working for defendant Mount Sinal Hospital (Mount Sinal or the hospital) as a Pavilion Manager in May 1987. Prior to being hired she had been diagnosed as having asthma. Although this condition had caused her discomfort, she was

able, with proper care and adjustment of her activities including regular exercise, to avoid discomfort and maintain her health. After Heilweil began working, she says she noticed a reduction it her capacity for exercise, began to cough and wheeze, and experienced sinus headaches. Her physician believed her symptoms were primarily caused by allergic reaction to her house cats and treated her for this with some success. Six months later she was promoted to the position of Management Associate. She was given responsibility for administrating the hospital's blood bank in April 1988 on a temporary basis, and eight months later in January 1989 this assignment became permanent. As administrator of the blood bank, she was in charge of supervising a $12 million dollar budget and 50 employees. In addition, she acted as a liaison between the blood bank and the hospital administration. Except for a small amount of time spent in the hematology department, Heilweil spent most of her working day in the blood bank. The hospital never expressed any dissatisfaction with her performance. To the contrary, Heilweil states she was repeatedly told by the administration that her work was outstanding.

The blood bank contains offices, labs and patient care facilities. Because it has no windows a forced air system provides it with ventilation. Heilweil complained to her superiors that when heating oil was delivered to the building, the ventilation system picked up the diesel fumes and circulated them into the blood bank. She also complained that natural gas fumes entered the office from an adjacent meter room, odors from soiled hospital linens emanated from a laundry chute that opened into a closet in the blood bank, and temperatures within the blood bank fluctuated widely. Plaintiff brought these matters to the attention of the hospital's Director of Institutional Safety Programs, Dr. Raymond Pfleger, and the former Medical Director of the blood bank, Dr. Greenberg. She told Dr. Greenberg that exposure to the blood bank's environment was causing her health problems.

In her complaint, plaintiff alleges that after her transfer to the blood bank her asthmatic symptoms worsened. There, she says, she began suffering physical and mental discomfort, including difficulty breathing, wheezing and coughing, respiratory infections, bronchitis, headaches, tightness in the chest, depression, and difficulty sleeping. Heilweil's physician advised her in March 1989 that the air quality at

the blood bank was an "asthmatics's nightmare," the principal cause of her, ailments, and that she should stay away from that facility.

Immediately after receiving her physician's diagnosis that the blood bank was the cause of her discomfort, Heilweil discussed her health concerns with her immediate supervisor, Joel Seligman, Associate Director of the hospital. Although the parties disagree as to precisely what was said, it is undisputed that because of her physical reaction to that facility's environment Heilweil was no longer expected to work there on a regular basis. At this meeting Seligman told her that a new Medical Director of the blood bank was coming on June 1, 1989 and asked her in the interim not to seek other employment outside or within Mount Sinai, but rather to continue in her work and to assist in the transition. She would then be allowed time to find a new job, and Seligman told her he would assist her in finding a position at Mount Sinal or another hospital. Mount Sinai agrees with Heilweil's description of what transpired between her and Seligman only adding that Seligman told her if she was unable to work in the blood bank, she could not hold the position of Administrator of that facility on a long-term basis. For the next several months, Heilweil never entered the blood bank, as she administered it from outside. Plaintiff maintains her health rapidly improved once this change in her work routine occurred.

On June 1, 1989 the new Medical Director of the blood bank arrived. The following day, Seligman asked Heilweil if she could go to the blood bank on a regular basis to meet with him. Heilweil refused, explaining that she felt ill very shortly after going into the blood bank and that she was then pregnant and was concerned for her baby's health. It became apparent to Seligman that Heilweil could not serve in her administrator capacity and that he would need to find a replacement. Later that month Seligman informed Heilweil that a person already on staff would take over the functions of blood bank administrator and that Heilweil would serve as her assistant until sometime in August. Heilweil was discharged on August 25, 1989.

Although Seligman had asked plaintiff at the June 1989 meeting to provide him with medical documentation regarding her asthmatic condition, she never did. In fact, the first medical documents Mount

Sinai received were physician's records attached to Heilweil's affidavit in opposition to Mount Sinai's motion for summary judgment. These documents were filed in November 1992, mare than three years after Mount Sinal requested this information. The records indicate that after March 1991 Heilweil's medical condition deteriorated to a point requiring surgical correction and that she may have developed a condition known as bronchiectasis, a change in the lining of the lung that renders it more sensitive and susceptible to fluid infiltration and infection.

In her complaint Heilweil claimed she was demoted and discharged in violation of the Rehabilitation Act, because she was then an individual with handicaps under the Act and Mount Sinal refused to reasonably accommodate her, that her pregnant condition caused her demotion and discharge, in violation of Title VII, and that Mount Sinal failed to provide her with a safe place to work. She also alleged two breach of contract causes of action. In her prayer for relief, plaintiff sought a declaration of her rights, an injunction, reinstatement, reasonable accommodation of her impairment, compensatory and punitive damages, attorney's fees, costs and interest.

On September 22, 1992 Mount Sinai moved for summary judgment on all plaintiff's claims. Heilweil did not oppose defendant's motion an the two breach of contract actions. In a memorandum and order filed August 3, 1993, the district court granted summary judgment on her Rehabilitation Act and pregnancy discrimination causes of action, and dismissed her common law claim against the hospital for failing to provide a safe work environment, deferring to the jurisdiction of the New York Workers' Compensation Board. Judgment was entered in favor of Mount Sinai on August 5, 1993. From this grant of summary Judgment plaintiff appeals.

DISCUSSION

On appeal Heilweil raises only two issues: the dismissal of her cause of action under the Rehabilitation Act and the dismissal of her common law safe workplace cause of action. We deal with each in turn.

The district court found that in June 1989 -- the relevant time -- Heilweil was not a handicapped person within the meaning of the Act because her respiratory problems were exacerbated only when she worked in the blood bank and thus her medical condition did not substantially limit one or more of her life activities. The trial court based its conclusion on Heilweil's statement that she felt "fine now that I haven't been in the blood bank for several months" and that she had been exercising regularly. Because Judge Owen ruled that plaintiff was not a handicapped person, he did not reach or discuss the other factors needed to be shown to make out a prima facie case under the Act.

I Scope of Review

Since this is an appeal from a grant of summary judgment, we apply the same standard as the district court and determine whether a genuine issue of material fact exists and if the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Taggart v. Time Inc., 924 F.2d 43, 45-46 (2d Cir. 1991). Only by reference to the substantive law can it be determined whether a disputed fact is material to the resolution of the dispute. See Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). All inferences drawn from the facts must be construed in a light most favorable to the nonmoving party, here plaintiff Heilweil. See Taggart, 924 F.2d at 46. It is only when no rational jury could find in favor of the nonmoving party, "that it can be said that there is no genuine issue of material fact and summary judgment properly may be granted to the moving party. See Gallo v. Prudential Residential Servs., 22 F.2d 1219, 1224 (2d Cir. 1994).

II Burden of Proof Under the Act

We turn to the Rehabilitation Act, which provides that "[n]o otherwise qualified individual with handicaps shall, solely by reason of her handicap, be excluded from the participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (1988), subsequently amended by Pub. L. No. 102-569, § 102(p)(32) (1992).

The plaintiff in a Rehabilitation Act suit bears the initial burden of establishing a prima facie case under the Act. The burden then shifts to the employer. If the employer asserts a neutral reason, unrelated to plaintiff's handicap, for its employment decision, then its burden is to "articulate a legitimate non-discriminatory reason for discharging the employee. See Gallo, 22 F.2d at 1224-25. The burden then shifts back to the plaintiff to show that the employer's stated reason is really a pretext for discrimination. Id. But if the employer relies on plaintiff's handicap as the reason for the adverse employment decision, then its burden is "to rebut the inference that the handicap was improperly taken into account by going forward with evidence that the handicap is relevant to qualifications for the position." Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981). The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that she is qualified despite her handicap. See id. at 776-77; see also Toahan v. Metro-North Commuter R.R., 951 F.2d 511, 514-15 (2d Cir. 1991), cert. denied, 113 S.Ct.54 (1992) (describing differences in employers' burdens depending upon the asserted reason for the discharge).

III Plaintiff's Prima Facie Case

A plaintiff makes out a prima facie case of discrimination under the Act by showing: 1) she is a handicapped person under the Act; 2) she is otherwise qualified to perform her job; 3) she was discharged because of her handicap; and 4) the employer is a recipient of Federal financial assistance. See Doe, 666 F.2d at 774-75; see also Bates v. Long Island R.R.. 997 F.2d 1028, 1035 (2d Cir.), cert. denied, 114 S.Ct. 550 (1993). Defendant contends, and the district court found, that Heilweil did not prove she is a handicapped person under the Act.

A. Proof of Handicap

Whether one is a handicapped person under the Act necessitates a two-pronged inquiry. It must first be determined whether a plaintiff has a physical or mental impairment. If so, it must then be decided whether such impairment substantially limits one or more of that person's major life activities. The term "individual with handicaps" is defined in the Act as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's

major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (1988), subsequently amended by Pub. L. No. 102-569, § 102(f)(2) (1992) and Pub L. No. 103-73, § 103(2)(B) (1993).

1. Physical Impairment. The regulations promulgated under the Act shed further light on the meaning of physical impairment and major life activity. In School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987), the Supreme Court said "[i]n determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance [and) provide 'an important source of guidance on the meaning of § 504 [of the Act].'" The regulations define physical or mental impairment as "any physiological disorder or condition affecting [the] . . . respiratory [system]." 45 C.F.R. 84.3(j)(2)(i)(A) (1989); see also 28 C.F.R. § 41.31(b)(1)(i) (1989) (same). Major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1989); see also 28 C.F.R. § 41.31(b)(2) (1989) (same). Because the Act is a remedial statute, it and the regulations promulgated under it are to be construed broadly. See Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir. 1991).

Heilweil insists she meets both prongs of the inquiry. She certainly satisfies the first prong. Plaintiff has suffered from asthma since 1987, before she began working at Mount Sinal. Asthma is a physiological disorder or condition that affects the respiratory system. Under the statute and applicable regulations, Heilweil suffers from a physical impairment. See 29 U.S.C. 706(8)(B) ; 45 C.F.R. § 84.3(j)(2)(i)(A); 28 C.F.R. § 41.31(b)(1)(i).

2. Major Life Activity. It is on the second prong -- whether plaintiff's physical condition affected a major life activity at the time the hospital discharged her -- where her case founders. Under the regulations the ability to breathe and work are major life activities. See 45 C.F.R. § 84.3(j)(2)(ii); 28 C.F.R. § 41.31(b)(2). We consider first whether plaintiff's ability to breathe was significantly affected by her asthmatic condition.

Heilweil contends her asthma significantly affected her day-to-day functioning. Yet in a June 12, 1989 conversation with Director of Human Resources Kruger, she stated that because she had not been in the blood bank for several months she felt "fine, now." Additionally, in plaintiff's deposition of July 12, 1990 -- almost a year after her discharge -- "she testified that her current respiratory condition did not limit her ability to exercise and that she had been swimming because she had a limited amount of time each day to exercise and swimming was a good overall workout. Byrne v. Board of Educ., 979 F.2d 560, 565 (7th Cir. 1992) (in a respiratory impairment case, evidence person participated in recreational activities undermines finding that person is handicapped under Act). Thus it appears that at the time Mount Sinai terminated plaintiff and throughout the following year Heilweil's ability to breathe restricted her only in a limited way, and did not bar her from exercising.

We pass now to whether plaintiff's physical impairment substantially limited her ability to work. In this analysis the kinds of jobs from which the impaired individual is disqualified must be carefully considered. An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one. See Jasany v. United States Postal Serv., 755 F.2d 1244, 1249, n.3 (6th Cir. 1985).

Plaintiff maintains she began to experience respiratory difficulties as soon as she began working at Mount Sinal, but reported that her physician thought those problems were related to allergic reactions to her house cats and that treatment somewhat alleviated her allergic reaction. Further, as discussed above, she told the Director of Human Resources that she felt "fine" after not having been in the blood bank for several months, implying that the blood bank was causing the respiratory problem. And, as plaintiff averred in her complaint, her "health improved rapidly once she stopped physically going into the Blood Bank."

It is quite apparent that the peculiar fumes within the blood bank exacerbated plaintiff's asthma, not the general environment of the hospital. Heilweil declares that it is not just the blood bank that made her asthmatic condition worse, but rather "her disability made it

impossible to work in any poorlyventilated place -- including Mount Sinai's blood bank." No medical proof substantiates this assertion. And, to defeat a motion for summary judgment a plaintiff cannot rely on "conjecture or surmise," Bryant v. Maffucci, 923 F.2d 979, 982 (2d cir.), cert. denied, 112 S.Ct. 152 (1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S 574, 586 (1986). Mount Sinai proved through plaintiff's own statements and those of her doctor that it was the conditions in the blood bank that worsened her asthmatic symptoms, leaving no genuine issue of material fact as to what caused her respiratory problems at her place of employment.

In Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989), we stated the obvious fact that a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working. In fact, every circuit to visit this issue has so ruled. See Gupton v. Virginia, 14 F.2d. 203, 205 (4th Cir. 1994) (for plaintiff to show allergy to tobacco smoke substantially limited ability to work, she had to show allergy foreclosed employment opportunities in her field), petition for cert. filed, 62 U.S.L.W. 3794 (May 9, 1994); Cook v. Rhode Island, 10 F.3d 17, 25 (1st Cir. 1993) (jury could find employer regarded plaintiff's condition as substantially limiting her ability to work because her condition foreclosed a wide range of employment options within the health care field); Byrne, 799 F.2d at 565 (a person's inability to perform a specific job for a specific employer does not substantially limit a person's ability to work); Walsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) ("[A]n impairment that an employer perceives as limiting an individual's ability to perform only one job is in not a handicap under the Act."); Maulding v. Sullivan, 161 F.2d 694, 698 (8th Cir. 1992) (plaintiff was not handicapped under the Act because sensitivity to chemicals prevented her from working only in lab and did not substantially limit employment opportunities as a whole), cert. denied, 113 S. Ct. 1255 (1993); Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1985) (substantial limitation on person's ability to work occurs when impairment forecloses generally "the type of employment involved").

Here plaintiff was medically restricted from-working in only one place in the hospital -- the blood bank. With respect to plaintiff's other employment opportunities, she stated at her deposition that Seligman, had told her he would help her find another position, whether at Mount Sinal or somewhere else. From this, it appears plaintiff was willing -- were such available -- to accept another position at Mount Sinai. Further, when Seligman attempted to contact Memorial Sloan-Kettering Cancer Center to see if a position was available for her there, Heilweil discouraged him because she thought her chances for employment there would be better if she made the initial contact. Plaintiff did contact Memorial Sloan-Kettering, apparently thinking this would be a viable employment alternative. Nothing suggests plaintiff's education and previous job experiences would hinder her ability to find a suitable position in the general field of administration. Heilweil is a college graduate with a master's degree in business administration, who since taking her degree has always been gainfully employed.

Heilweil was not therefore a handicapped person under the Act when she was discharged because her asthmatic condition not substantially limit a major life activity -- either her ability to breathe or work -- defendant's motion for summary Judgment was properly granted.

B. Subsequent Medical Evidence

We now turn to evidence of plaintiff's medical condition two years after she left Mount Sinai's employ. Although the proof was offered and rejected by the district court, the issue of what knowledge an employer under the Rehabilitation Act must have at the time it makes its decision was neither briefed by the part as or decided by Judge Owen. On appeal the issue has been fully briefed. We could remand to the district court for it to decide this issue in the first instance, but we see no reason to do so because there are no facts in dispute -- either as to Heilweil's condition before or subsequent to her discharge when the bronchiectasis was diagnosed -- and the issue to be decided is solely one of law, which we may decide ourselves.

Heilweil's medical evidence submitted with her affidavit in opposition to defendant's motion for summary judgment, as noted

earlier, indicates that in 1991 she may have been suffering from something more than asthma. We do not think this later obtained medical information is probative on the issue of whether or not she was a handicapped person under the Act when in June 1989 Mount Sinai decided to discharge her. Mount Sinai was then on notice that plaintiff suffered from symptoms of an asthmatic reaction that her doctor said was caused by the conditions in the blood bank. Both Seligman and Director of Human Resources, Kenneth Kruger, requested plaintiff to submit medical verification of her condition, but she never did. Heilweil cannot therefore now complain that she was discharged based on information that she may have been suffering from a different condition at the time she was terminated, when concededly neither she nor Mount Sinai was aware of it.

Heilweil contends that the district court should have considered this 1991 medical evidence as demonstrating that she had been suffering from a chronic and serious sinus condition, which eventually required surgery, and that her condition dated back to 1989. In so stating appellant relies on decisional law for the proposition that subsequent medical evidence is probative of a Rehabilitation Act claimant's medical condition at the time the employer made the adverse employment decision. The decisional law is quite to the contrary.

Plaintiff relies first on Mantolete v. Bolgar, 767 F.2d 1416, 1424 (9th Cir. 1985). There the Ninth Circuit held it was not an abuse of discretion to refuse to consider subsequent medical evidence an employer had obtained after discharging plaintiffs. Although the court stated the evidence might be considered for the purpose of refuting plaintiff's claim that she was qualified for the position, it also concluded that "[t]he asserted basis for the employer's decision not to hire the plaintiff is limited to the evidence relied on by the employer at tie time the decision was made." As a corollary, an employer is only responsible for employment decisions based on information available to it when it decides. See Landefeld v. Marion Gen. Hosp., Inc., 994 F.2d 1178, 1181 (6th Cir. 1993) (plaintiff not dismissed solely by reason of handicap because decisionmaker had no knowledge of it); cf. Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 877 n.6 (9th Cir. 1986) ("As long as the employer is on notice that an employee suffers from a serious medical condition, it may be liable under the

(Washington) handicap-discrimination law."), cert. denied, 498 U.S. 814 (1990); O'Keefe v. Niagara Mohawk Power Corp., 714 F. Supp. 622, 627 (N.D.N.Y. 1989) (employer did not violate New York law when it discharged plaintiff prior to becoming aware of his alcohol problem). Of course, here there was no such notice. Plaintiff's further reliance on three cases discussed earlier in her quest to convince us that the district court erred by not considering her subsequent medical evidence gives her no comfort. In all three, no subsequent medical proof was offered to show the plaintiff was handicapped at the time of the relevant employment decision. See Byrne, 979 F.2d it 565; Forrisi, 794 F-2d at 934; Jasany, 755 F.2d at 1250.

IV Providing Plaintiff with a Safe Place to Work

In dismissing Heilweil's common law cause of action alleging that Mount Sinai breached its duty to provide a safe place to work, the district court deferred to the expertise of the New York Workers' Compensation Board because it has primary jurisdiction over the matter. Section 10 of the New York Workers' Compensation Law mandates that every employer shall provide compensation to its employees for a disability from an injury "arising out of and in the course of [their) employment." N.Y. Work. Comp. Law § 10 (McKinney 1992). "The liability if an employer shall be exclusive and in place of any other liability whatsoever . . . ." Id. § 11. "In any proceeding for the enforcement of a claim for compensation . . ., it shall be presumed in the absence of substantial evidence to the contrary [t]hat the claim comes within the provision of this chapter. . . ." Id. § 21 (McKinney 1993).

Whether the injury "arises out of and in the course of the employment" is "one of the most important criteria for determining whether an employer is liable for a worker's disability." Id. § 10 Practice Commentary (McKinney 1992); Section 2 of the Law defines injury as encompassing "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." Id. § 2(7) (1992). An occupational disease is defined as "a disease resulting from the nature of employment and contracted therein." Id. § 2(15).

In Liss v. Trans Auto Systems, Inc., 68 NY2d 15, 20-21 (1986), the New York Court of Appeals held that the Board has primary jurisdiction regarding the availability of Workers' Compensation and plaintiff must litigate this issue before the Board. Since plaintiff's case presents a mixed question of fact and law, the Board must first decide if there is a causal connection between the deterioration of Heilweil's asthma and the conditions in the blood bank and, if so, whether such reaction is an accidental injury or occupational disease under the statute. Plaintiff's evidence regarding her physical condition in 1991 may be relevant to the Board's consideration of causal connection.

It is of course within the Board's authority to determine whether a physical condition that later manifests itself was caused by a condition of the worker's employment, and, if so, to compensate the employee accordingly for the incurred disability. An employer's responsibilities under the Act are not so broad. Nothing in the statute, regulations, logic or the decisional law charges an employer with liability for a handicapped condition of which it had no notice when it discharged an employee. The only pertinent language to hold an employer liable is that it must act because of an employee's handicap. The same responsibility is not thrust on employers as is on the Board. Were it otherwise, an employer could be subject to damages long after an employee had been terminated without being afforded the ameliorative opportunity to avoid such penalty by taking steps reasonably to accommodate the now known-to-be handicapped employee.

The district court did not abuse its discretion by deferring to the Board, especially because what constitutes an occupational disease or an accidental injury under the workers' compensation law is a fine distinction best left to the expertise of the Board. Compare Johannesen v. New York City Dep't of Hous. Preservation & Dev., No. 89, 1994 WL 270419 at *1, *3 (N.Y. C.A. June 21, 1994) (plaintiff suffered an "accidental injury" when he began suffering from bronchial asthma due to exposure to tobacco smoke and dust at work) with Mack v. County of Rockland, 71 NY2d 1008, 1009 (1988) (an aggravation of plaintiff's preexisting eye disorder by exposure to cigarette smoke in a poorly ventilated room was not an "occupational disease" under the statute). Because plaintiff chose not to litigate this issue before the Board, the district court correctly avoided ruling on the merits of her claim,

referring it to the Board for its determination. See Liss, 68 NY2d at 21.

The instant case is unlike Shine v. Duncan Petroleum Transport, Inc., 60 NY2d 22, 26 (1983), where the trial court improperly issued a stay on the morning of jury selection when the defendant asserted the workers' compensation defense as a bar to plaintiff's civil action. Shine held this action to be an abuse of discretion because the defendant had known the factual and legal aspects of the case for over two years and waited until the last minute to assert its jurisdictional defense. See id. at 27-28. Here, Mount Sinai asserted the worker's compensation defense in its answer to plaintiff's complaint thereby alerting Heilweil that it intended to assert it and causing her no prejudice when it did.

CONCLUSION

The district court's grant of summary judgment to Mount Sinai Hospital dismissing plaintiff's claim of discrimination under the Act ia affirmed as at the time the adverse employment decision was made she was not a handicapped person under the Act. We also affirm the dismissal of plaintiff's common law cause of action for failure to provide a safe work environment as Heilweil must first litigate this latter claim before the New York Worker's Compensation Board.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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DONNA HEILWEIL,

Plaintiff,

-v-

MEMORANDUM AND ORDER
89 Civ. 4462 (R)

MOUNT SINAI HOSPITAL,

Defendant.

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OWEN, District Judge

Plaintiff Donna Heilweil, an asthmatic, has sued Mount Sinai hospital alleging three causes of action stemming from her termination as administrator of the hospital blood bank in 1989. She had responsibility for the day-to-day administration of a $12 million annual budget and about 50 employees, overseeing such matters as budget, purchasing, facilities, maintenance, supplies, personnel, and all other non-medical aspects of the operation of the blood bank, and serving as principal liaison between the Hospital's administration and the Medical Director of the blood bank. Plaintiff's office was in the blood bank, and she necessarily had to be within the bank from time-to-time to do her job properly. It appears that ventilation in the blood bank was quite poor and this caused her various respiratory problems.

Count I alleges a violation of the Federal Rehabilitation Act, asserting that she was an "individual with handicaps" under that statute. Count II alleges that Mount Sinai accelerated plaintiff's discharge because she became pregnant. Count Ill alleges a tortious breach of a common law duty to provide a safe workplace. Mount Sinal moves for summary judgment.

The Federal Rehabilitation Act prohibits programs receiving federal financial assistance[1] from discriminating against handicapped individuals solely because of their handicaps. One definition of a handicapped person "is one who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities," 29 U.S.C. 706(8)(B) (1992) (emphasis added). "Breathing" and "working" are "major life activities" within the meaning of the Act. 45 C.F.R. Part 84.3(j)(2)(ii). "Physical impairments" include respiratory conditions under the Act. 45 C.F.R. 84.3(J)(2)(1).

While plaintiff's respiratory condition was severely exacerbated by working in the blood bank, it only happened in the bank and she, in her words at the time of her deposition, felt "fine now that I haven't been in the blood bank for several months, ..." Also she was then swimming one half hour a day as a substitute for weight lifting and jogging, she testified.[2] Under these circumstances, plaintiff's condition as it existed in or about June 1989 did not substantially limit one or more of her life activities, and therefore, she was not "handicapped" within the meaning of the Act. An impairment which only renders one unable to perform one particular job is not a handicapped person within the meaning of the Act. See Welsh v. City of Tulsa, No. 91-5138, 1992 U.S. App. LEXIS 27249 (10th Cir. October 23, 1992); Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992); Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasny v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985).

Plaintiff next asserts that her termination was wrongfully accelerated due to her becoming pregnant. From plaintiff's own deposition, during which defendant's counsel used plaintiff's rather

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[1] The parties are in dispute as to whether Mount Sinai receives federal financial assistance. Concluding as I do that plaintiff was not handicapped within the meaning of the Act, see infra, I need not, and do not, resolve this issue.

[2] "I have only a limited amount of time each day I can devote to exercising, and at this stage I thought that swimming would be a better overall workout."

detailed contemporaneous notes as a starting point,[3] the following undisputed facts appear:

Because plaintiff could no longer work in the blood bank, on March 31, 1989, (long before plaintiff knew of her pregnancy), she discussed with Joel Seligman, her supervisor, that a replacement for her would hopefully be selected by June 1, said replacement to start on July I with plaintiff thereafter to have a one-month overlap with the new administrator during which time her office would be outside the blood bank. It was expected, however, that she could go into the blood bank from time-to-time to do some necessary work. She was then to stay on two months thereafter to October 1 at which time, unless Seligman could find something else for her she wanted or that was given, her Mount Sinal employment would end,[4] in which event Seligman would help her find another position elsewhere and money to "tide over during hunt."

On April 19, plaintiff wrote Seligman a memo containing the acknowledgement that he was trying to find her some other position in the hospital, as well as elsewhere. Her memo reads:

> I met Lois Torello earlier this week. No positions are currently available. She advised me to check the job

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[3] Her notes read:

> New person start July. Can get funds for one-month overlap. Two-month float August 1 through October 1. Donna ends. July 1 to September 1 new person starts. Aiming to select by June 1. May 15 have three good candidates. April 15 start looking. Can count on help in finding other position even if elsewhere and on money to tide over during hunt.

[4] Plaintiff's statement in her deposition that October 1 was only the date on which her blood bank responsibilities ended is contradicted by her statement that in March, Seligman told her that if necessary he would help her find work outside of Mount Sinai by the time October 1 rolled around. See supra, fn. 3.

> postings frequently, and to enlist your aid in identifying a suitable position. Please start to check about possible positions here and at other institutions.
>
> In late March you indicated you would obtain Wendy Goldstein's approval to give me full salary in the event that my position at the Blood Bank should be terminated and no other mutually acceptable alternative is available (emphasis added).

No other "mutually acceptable" position at Mount Sinai appeared. On June 2, plaintiff again met with Seligman. He asked her to go into the blood bank to meet with Mount Sinai's new medical director. She said, according to her:

> No, that would not be possible .... I then told him that I had just found out I was pregnant. He congratulated me and said that we used to be on about an October time frame for me leaving the blood bank and that now that would no longer be sufficient, we would have to step things up.
>
> I had said something about that now that I knew I was pregnant, I was concerned for my baby when I thought about entering the blood bank. He said, "Oh, no. you shouldn't go down there, it wouldn't be good for the baby," or something to that effect. He may have said if I felt that way, that he could understand or he agreed with it.

From the foregoing, on plaintiff's own testimony, it is clear that the resulting five weeks acceleration of her departure from October 1 back to August 25, was not a discrimination against her because of her pregnancy but a practical resolution of the end of the relationship, given her concern for her baby and her unwillingness to ever again enter the blood bank. In any event, I do not see that a mere five weeks advancement of her departure date gives rise to a cause of action for discrimination under these circumstances, and it is obviously patently specious for plaintiff to argue as she does in her memorandum at p. 22

that she was caused loss by her earlier termination "on August 25, 1992, just a few months before she would have been entitled to payments pursuant to defendant's disability benefits plan," since even the October 1 departure date, which she had worked out in March (see her notes, supra) was itself "a few months before" she claims she would have been entitled to disability payments.

Finally, plaintiff alleges that Mount Sinal had a common law duty to provide a safe workplace. As New York's Worker's Compensation Board has primary jurisdiction over such matters, I choose to defer this claim to the expertise of that administrative body.

Mount Sinai's motion for summary judgment is accordingly, granted.[5]

Dated: July [30], 1993
New York, New York

ROBERT OWEN
United States District Judge

[5] I have not considered the unsolicited materials submitted by plaintiff a few days ago, noting that in any event, they seem to bear upon her physical condition at the present and not in 1989, as to which the record is quite clear, see supra.

29 U.S.C. § 794(a)

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to the section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulations may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 706(8)(b)

The term "individual with a disability" means any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Amended by Pub. L. No. 102-569, § 102(f)(2) (1992); Pub. L. No. 102-73, § 103(2)(B) (1993). The current form of this section is as follows:

For the purposes of this chapter:

(8)(A) Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, VI, or VIII of this chapter.

(B) Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 713, and 714 of this title, and subchapters II, IV, V, and VII of this chapter, an person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

(C) [excludes alcoholism and illegal drug use from definition of "individual with a disability"];

(D) [excludes certain infectious diseases from definition of disability as applied under §§ 793 and 794 of the Act].

(E) [excludes homosexuality and bisexuality from definition of disability as applied under §§ 791, 793 and 794 of the Act].

(F) [excludes certain specified "sexual behavior disorders," "compulsive gambling, kleptomania, or pyromania," and psychoactive substance use disorders" from the definition of disability as applied under §§ 791, 793 and 794 of the Act].

28 C.F.R. § 41.31

§ 41.31 Handicapped person.

(a) *Handicapped person* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) *Physical or mental impairment* means: (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic

and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder such as . . . .

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means: (i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment.

Supreme Court, U.S.
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No. 94-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONNA HEILWEIL,

Petitioner,

—v.—

MOUNT SINAI HOSPITAL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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18 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether an employee who, during the relevant time period, claimed to be medically unable to work in one particular location because of her adverse reaction to the particular environment of that site was an "individual with handicaps" as that term is defined in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.* (1994). The Court below held that such a person was not an "individual with handicaps."

Whether an employee can be considered an "individual with handicaps" within the meaning of the Rehabilitation Act on the basis of a latent medical condition that, at the time of the employee's termination, produced no symptoms and was unknown to both the employee and the employer. The Court below answered in the negative.

Does the unanimous decision of the Court of Appeals for the Second Circuit, which was in accordance with the decisions of every federal appellate court that has addressed the issue, merit review by this Court?

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COUNTERSTATEMENT OF THE CASE

PRELIMINARY STATEMENT

In her zeal to obtain review, Petitioner has grossly distorted both the issues presented to the court below and the scope and meaning of the court's decision. The decision below stands for two propositions, neither of which conflicts with the determinations of this Court or of any other circuit or portends any diminution or alteration of the federal Rehabilitation Act.

The court below decided, as has every other circuit that has addressed the issue, that a person who is unable to perform a particular job or to work in a particular location does not have an impairment that "substantially limits one or more major life activities" and, therefore, is not an "individual with handicaps" as that term is defined in the Rehabilitation Act.

The court's second unremarkable holding was that a latent medical condition that produced no symptoms and was unknown to both employer and employee at the time the employee was discharged cannot form the basis for a Rehabilitation Act claim. The statute, of course, imposes no obligation of prescience, and Petitioner can cite no contrary authority.

The court below did not decide, as Petitioner now urges, that the duty to accommodate a permanent disability can be avoided by providing merely a temporary accommodation. No such question was presented. Nor did the court below deviate, as Petitioner claims, from the limitations of a motion for summary judgment. There was no genuine dispute as to any material fact; indeed, virtually all the facts were taken from Petitioner's own deposition testimony and contemporaneous notes. Based on Petitioner's own statements, the court concluded, as a matter of law on the undisputed facts, that Petitioner was not an "individual with handicaps" under the statute.

COUNTERSTATEMENT OF FACTS

In the spring of 1989, Petitioner Donna Heilweil told her supervisor at The Mount Sinai Hospital (the "Hospital") that she could not work in the Hospital's Blood Bank, where she was employed as Administrator, because something in the unique environment of that location (a combination, according to Petitioner, of heating oil and natural gas fumes, soiled linen odors and temperature fluctuations) exacerbated her asthma and made her ill. She was asked to provide supporting medical documentation, but refused to do so. Nevertheless, she was allowed to stop working in that area, and her symptoms disappeared. She then told the Hospital that she was "feeling fine" and was experiencing no further medical problems.

These were the operative facts in June 1989, when Heilweil commenced this suit under the Rehabilitation Act, 29 U.S.C. §§ 701, *et seq.* (1994), to compel the Hospital to retain her as Administrator of the Blood Bank despite her refusal to ever set foot in that location, and these were still the operative facts in August 1989 when the Hospital, having been unable to find another position for her (and being unwilling to let her remain as Administrator of the Blood Bank *in absentia*), let her go. Indeed, these were still the operative facts a year later, when Heilweil was deposed in this action. She was still feeling well and was still able to engage in all major life activities without significant limitation.

Heilweil filed a complaint in the United States District Court for the Southern District of New York on June 27, 1989 (prior to the termination of her employment at the Hospital), alleging violation of the Rehabilitation Act.[1] After the completion of discovery, the Hospital moved for summary judg-

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[1] She also asserted three pendent state-law claims, and later amended her complaint to add a claim of pregnancy discrimination under Title VII, 42 U.S.C. § 2000e-5 (1994). These other claims have all been withdrawn or dismissed. The only issue presented to this Court is the claim under the Rehabilitation Act.

ment on the grounds that Heilweil was not an "individual with handicaps" as that term is defined in the Rehabilitation Act. In response to that motion, Heilweil submitted new documentation regarding her medical condition. These medical records indicated that in 1991—two years after her discharge and the commencement of this litigation—Heilweil was diagnosed with "pansinusitis," a respiratory infection of the sinuses, and possibly "bronchiectasis," an ailment affecting the lungs. The medical documents submitted suggested that these conditions may have originated in latent conditions existing prior to 1991.

OPINIONS BELOW

The District Court held, on the undisputed facts before it, that Heilweil was not an "individual with handicaps" under the Rehabilitation Act, and dismissed the claim.

Specifically, Judge Richard Owen said:

> The Federal Rehabilitation Act prohibits programs receiving federal financial assistance from discriminating against handicapped individuals solely because of their handicaps. One definition of a handicapped person "is one who (i) has a physical or mental impairment which *substantially limits* one or more of such person's major life activities," 29 U.S.C. 706(8)(B) (1992) (emphasis added). "Breathing" and "working" are "major life activities" within the meaning of the Act. 45 C.F.R. Part 84.3(j)(2)(ii). "Physical impairments" include respiratory conditions under the Act. 45 C.F.R. 84.3(J)(2)(1).
>
> While plaintiff's respiratory condition was severely exacerbated by working in the blood bank, it only happened in the bank and she, in her words at the time of her deposition, felt "fine now that I haven't been in the blood bank for several months, ..." Also she was then swimming one half hour a day as a substitute for

> weight lifting and jogging, she testified. Under these circumstances, plaintiff's condition *as it existed in or about* June 1989 did not substantially limit one or more of her life activities, and therefore, she was not "handicapped" within the meaning of the Act. An impairment which only renders one unable to perform one particular job is not a handicapped person within the meaning of the Act. *See Welsh v. City of Tulsa*, No. 91-5138, 1992 U.S. App. LEXIS 27249 [977 F.2d 1415] (10th Cir. October 23, 1992); *Maulding v. Sullivan*, 961 F.2d 694 (8th Cir. 1992)[, *cert. denied*, 113 S. Ct. 1255 (1993)]; *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasny* (sic) *v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985.

Slip Op. (July 30, 1993), Appendix to Pet. for Writ of Cert. at 18a (footnote omitted).[2]

The Court of Appeals for the Second Circuit affirmed. *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994). Writing for a unanimous court, Judge Cardamone carefully reviewed the statute, the applicable regulations, and the substantial body of case law that has developed on the question of what level of "impairment" is needed to come within the purview of the Act.[3] He concluded, as had the District Court,

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[2] In her Petition, Heilweil claims that "[t]he District Court reasoned . . . that the decision to terminate was not discriminatory because it was made at a time when Heilweil was not disabled." Pet. for Writ of Cert. at 7. This characterization—suggesting that the court had mistaken remission of symptoms for absence of disability—is a disingenuous distortion of the District Court's holding. The court held that, regardless of whether her symptoms were active or dormant, Heilweil was not an "individual with handicaps" within the meaning of the Rehabilitation Act because her impairment rendered her "unable to perform one particular job" and did not "substantially limit one or more of her life activities." Slip. Op. (July 30, 1993), Appendix to Pet. for Writ of Cert. at 18a.

[3] The statute expressly provides that not every "impairment" renders one an "individual with handicaps" entitled to statutory protection. Only a person who has an impairment that "substantially limits one or more of such person's major life activities" is covered by the statute. 29 U.S.C. § 706(8)(B) (1994).

that "plaintiff's own statements and those of her doctor [proved] that it was the conditions in the blood bank that worsened her asthmatic symptoms, leaving no genuine issue of material fact as to what caused her respiratory problems at her place of employment." *Id.* at 723.

The court acknowledged that both breathing and working are "major life activities," but, on the undisputed facts, Petitioner's ability to engage in these activities was not substantially limited. With respect to the activity of breathing, Petitioner's own statements to the Hospital in 1989, and her testimony at deposition a year later, established that once she stopped working in the Blood Bank she suffered no respiratory difficulties: she told the Hospital that she felt "fine" after she stopped working in the Blood Bank; she stopped taking medication; she stopped seeing a doctor; she gave birth to a healthy baby girl; and she engaged in regular exercise.

With respect to her ability to work, the court held, in accordance with its own precedent,[4] and the decisions of "every circuit to visit th[e] issue," that "a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working." *Id.* at 723. Again, Petitioner's own contemporaneous statements, the allegations in her complaint, and her testimony at deposition, all established that her ability to work in general was not substantially limited, so long as she did not have to go into the Blood Bank.

Finally, the Second Circuit rejected Heilweil's attempt to rely on the 1991 medical records submitted in response to the Hospital's motion, holding that this subsequent medical evidence was not "probative on the issue of whether or not [Heilweil] was a handicapped person under the Act" in 1989. *Id.* at 724. Noting Petitioner's specific refusal to provide medical documentation in 1989 when the Hospital asked her to do so, Judge Cardamone concluded that she could not "now com-

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[4] *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989).

plain that she was discharged based on information that she may have been suffering from a different condition at the time she was terminated, when concededly neither she nor Mount Sinai was aware of it." *Id.* Petitioner's argument that the subsequent medical evidence was probative of her condition in 1989 was also rejected, because "an employer is only responsible for employment decisions based on information available to it when it decides." *Id.* at 725 (citations omitted).

REASONS WHY REVIEW IS NOT WARRANTED

I. Heilweil Was Not An "Individual With Handicaps" As Defined In The Rehabilitation Act Of 1973.

The Rehabilitation Act provides that no "otherwise qualified individual with handicaps"[5] may be discriminated against solely on the basis of that handicap by any program or activity that receives federal financial assistance. 29 U.S.C. § 794 (1994). The statute defines an "individual with handicaps" as a person,

> who (i) has a physical or mental impairment which *substantially limits* one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B) (1994) (emphasis added). On this definition, and taking Heilweil's own version of the material facts, the courts below concluded that Heilweil was not an "individual with handicaps" under the Rehabilitation Act.

Among the factors to be considered in determining whether a particular individual qualifies as an "individual with handicaps" under the Rehabilitation Act are the number and types

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[5] The Act was amended in 1992 (Pub. L. No. 102-569, 106 Stat. 4344-4488 (codified as amended at 29 U.S.C. §§ 701, *et seq.* (1992))) to, among other things, substitute the words "a disability" for "handicaps," but was not materially altered with respect to any issue now before this Court.

of jobs an impaired individual is unable to perform due to his or her impairment. *See Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985).

In its decision below, the Second Circuit, like every other federal appellate court that has addressed the issue, held that impairments or conditions that prevent an individual from performing a particular job or working in a particular location are not sufficient to establish a "handicap" under the Rehabilitation Act. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994); *Gupton v. Virginia*, 14 F.3d 203 (4th Cir.), *cert. denied*, 115 S. Ct. 59 (1994); *Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993); *Byrne v. Board. of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992); *Welsh*, 977 F.2d at 1419; *Maulding v. Sullivan*, 961 F.2d 694 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993); *Jasany*, 755 F.2d at 1249.

To meet the requirements of the statute, Petitioner had to demonstrate that her asthmatic condition "substantially limit[ed]" one or more of her "major life activities." The mere presence of an "impairment" (in this case, asthma) does not meet the definition of "individual with handicaps" under the Rehabilitation Act. See *Harris v. Adams*, 873 F.2d 929, 933 (6th Cir. 1989) (plaintiff failed to demonstrate that his asthma substantially limited any of his major life activities). The record here, based on Petitioner's own testimony and contemporaneous notes, did not support her claim.

Thus, the undisputed facts established that the only limitation that either Petitioner or the Hospital knew about in 1989—when the Hospital took the actions at issue in this lawsuit—was that Petitioner was unable to work in the Blood Bank.[6] She did not claim that she was unable to work any-

[6] Petitioner was specifically asked to provide medical documentation of her condition, and she refused to do so. This fact alone makes this case a singularly inappropriate vehicle for this Court's review. She attempts to avoid this consequence of her refusal to provide medical doc-

where other than the Blood Bank. To the contrary, her complaint asserted that she should have been permitted to administer the Blood Bank from some other location in the Hospital. As her "impairment" did not "substantially limit" her ability to breathe or work or engage in any other "major life activities," she was not an "individual with handicaps" under the Rehabilitation Act.[7]

Contrary to Petitioner's claims, there is no conflict among the Courts of Appeal. All that have addressed the issue agree that the statutory definition of an "individual with handicaps" is not met by an impairment that limits an individual's ability to perform only a narrow range of jobs or to work only in a narrow range of locations. Petitioner's reliance on *Ackerman v. Western Elec. Co.*, 643 F. Supp. 836 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988), and *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982), is misplaced.

Although the district courts in *Ackerman* and *Vickers* may have applied the definition of "individual with handicaps" in an overly expansive manner, the Ninth Circuit subsequently made clear that it concurred with the prevailing view that "in order

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umentation by arguing that the Hospital must have known her condition because she obtained treatment there. By law, however, her patient records were confidential and could not be disclosed without her consent. *See* N.Y. Comp. Codes R. & Regs. tit. 10, §§ 405.1(12)-(13), 405.10 (1994).

[7] Heilweil argues that the courts below improperly resolved an alleged factual dispute as to precisely when the decision to terminate her employment was made. She claims the decision was made in March 1989, *i.e.* while she was suffering respiratory distress from exposure to the environment in the Blood Bank, rather than in June 1989, after her symptoms had cleared up. Pet. for Writ of Cert. at 11-12. Although even her own contemporaneous notes do not support the claim she now makes (as the courts below noted), her argument simply misses the point. The timing of the decision to terminate her employment is not material to the issues in this case. Regardless of whether the decision was made in March or June, at *no* time was Heilweil an "individual with handicaps" under the Act, because at *all* relevant times she never suffered from anything but an inability to work in the Blood Bank.

to come within the protection of the statute, the impairment must substantially limit an individual's employability generally, and not just with respect to one particular job." *Miller v. AT&T Network Sys.*, 722 F. Supp. 633, 639 (D. Ore. 1989), *aff'd on the op. below*, 915 F.2d 1404 (9th Cir. 1990). Moreover, there was no discussion in *Ackerman* of the extent to which the plaintiff's condition substantially limited one or more of her major life activities, although the court did note that the plaintiff had been out of work for ten months due to her asthma and could return to work only under the general restrictions to avoid dust and heavy exercise. *Ackerman*, 643 F. Supp. at 842. The Ninth Circuit, in affirming the district court's decision, did not discuss this issue. Similarly, in *Vickers*, the court specifically noted, without elaboration, that the plaintiff's "hypersensitivity" to tobacco smoke "does in fact limit at least one of his major life activities." *Vickers*, 549 F. Supp. at 87. In the present case, however, Petitioner was unable to work in the unique environment of only one location.

Petitioner's reliance on *Byrne v. Board. of Educ.*, *supra*, is also misplaced. In *Byrne*, the Seventh Circuit made clear that its view of the law is no different from that of the Second Circuit and all the other circuits that have addressed the issue. As the court specifically noted in *Byrne*: "It is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally." *Byrne*, 979 F.2d at 565. The *Byrne* court, noting the existence of "conflicting" evidence concerning the plaintiff's condition, held that the question of handicap status was properly submitted to the jury (which ruled in favor of the employer). No such conflicting evidence was presented here.

Accordingly, on the undisputed facts in this record, at the time of the events complained of Petitioner did not meet the definition of an "individual with handicaps" as defined in the Rehabilitation Act. The Second Circuit's decision to that effect was entirely correct.

II. Petitioner's Argument That The Second Circuit's Decision Creates An Exception That Swallows The Rule Ignores The Record And Mischaracterizes The Decision Below.

Petitioner repeatedly states that the record demonstrates that she suffered from a "permanent disability." Based on this characterization, she contends that the court below has carved out an exception to the Act that, she contends, swallows the rule; to wit: An employer has the right to terminate an employee with a "permanent disability" after the symptoms associated with the "permanent disability" subside because the employer had removed the employee from the "workplace stimulus" that caused these symptoms.

This argument is simply not applicable to the facts here, and misrepresents the scope of the decision below. As a matter of law, Petitioner was not an "individual with handicaps" because her impairment did not "substantially limit one or more of [her] major life activities." Therefore, she was not, for purposes of this law, "permanently disabled." Thus, her claims as to the scope of the lower court's decision are false and misleading. The issue raised and resolved on the Hospital's motion for summary judgment was whether, at the time of the acts of which she complains, Petitioner's condition rendered her an "individual with handicaps" as defined under the statute. The court below appropriately answered this question in the negative.

The court below did not reach any of the broader issues Petitioner suggests, nor can its decision properly be read to permit employers to circumvent the Act as she presently alleges. Specifically, she argues that an employer could provide a temporary accommodation for a disabled individual, then discharge the employee with impunity. Of course, the court below said no such thing. The issue of what an employer may or must do with respect to an "individual with

handicaps" was never addressed, because Petitioner never crossed that threshold.

III. The Court Below Properly Rejected Medical Evidence Discovered After The Events In Issue.

In her response to the Hospital's summary judgment motion, some three years after the events giving rise to this lawsuit, Petitioner proffered the affidavit of her then-current physician. The evidence provided was to the effect that, beginning in 1991 (almost two years after she had commenced this lawsuit), Heilweil was diagnosed with having (or possibly having) bronchiectasis and pansinusitis, which her doctor believed might have originated in latent conditions existing in or before 1989. The Second Circuit held that this information did nothing to assist Petitioner's claim that the Hospital had discriminated against her in 1989. Petitioner challenges this determination.

To the extent that her after-acquired evidence was offered to prove that Petitioner was an "individual with handicaps" in 1991 (or thereafter), it is plainly irrelevant. Obviously, a person who was not "handicapped" at one time may become "handicapped" at a later date. The issue is not whether Heilweil is handicapped now, or was handicapped in 1991, but whether she was handicapped (within the meaning of the Act) in or about March-June 1989. Under her theory, because Heilweil had said that she was able to work anywhere but the Blood Bank (because the unique environment of that room exacerbated her asthma), the Hospital was required by law to accommodate a different condition that Heilweil did not then claim to have and that would not manifest itself until years later.[8]

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[8] *See* Pet. for Writ of Cert. at 12, where Heilweil suggests that the Courts below erred by finding that she was not "significantly impaired" in June 1989 when "that subject assessment *with hindsight* is known to be completely wrong." (Emphasis added.)

Unquestionably, as she presented herself to the Hospital in 1989, Petitioner was not an "individual with handicaps" under the Act. Heilweil's contention—that the Hospital violated the law because, unbeknownst to her or to the Hospital, she really had a handicapping condition in 1989 in the form of latent "pansinusitis" and unknown "bronchiectasis"—is wholly untenable. Neither Heilweil nor the Hospital knew of these conditions at the time the Hospital took the employment actions at issue. The totality of the information presented to the Hospital at the time it took the actions of which Petitioner complains was that something in the environment in the Blood Bank—some combination, according to Heilweil, of temperature fluctuations, heating oil fumes, natural gas fumes and soiled linen odors—exacerbated her asthma, and that she was, in her own word, "fine" when she stayed out of the Blood Bank.

On these facts, the Rehabilitation Act does not apply, and later diagnoses of new medical conditions (or old ones newly discovered) do not enlarge the Hospital's obligations under the Act. Petitioner cites no authority—statute, regulation, legislative history, case law or common sense—for the distinctly odd proposition that an employer must accommodate a condition that is unknown to both the employer and the employee. As the court below noted, "[t]he decisional law is quite to the contrary." *Heilweil*, *supra*, 32 F.3d at 725 (*citing*, *inter alia*, *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181 (6th Cir. 1993) and *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985)).

CONCLUSION

For the foregoing releases, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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